Supreme Court, U. S.
FILED
[illegible] 1980
[illegible], JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1223

IN THE MATTER OF: ROGERS W. KIRVEN

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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The Petitioner, Rogers W. Kirven, respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of South Carolina entered in this proceeding on September 14, 1979, followed by a denial of Petition for Rehearing and Reconsideration dated October 10, 1979.

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OPINION BELOW

The Report of the Committee on Character and Fitness of the South Carolina Supreme Court dated June 10, 1979 and the Order of the South Carolina Supreme Court thereupon denying the Petition by Rogers Kirven for Reinstatement to the Practice of Law dated September 14, 1979 are un-reported and are included in Appendix A to this Petition. The Order of the Supreme Court denying the Petition for Rehearing and Reconsideration of Petition for Reinstatment, dated October 10, 1979, is unreported and the letter evidencing it is included as Appendix B to this Petition.

JURISDICTION

The denial by the Supreme Court of the State of South Carolina of the Petition by Rogers W. Kirven for Rehearing and Reconsideration of his Petition for Reinstatement, which is sought to be reviewed here, was filed October 10, 1979. Application for extension to file this petition for writ of certiorari was submitted to The Honorable Chief Justice Warren E. Burger as Circuit Justice for the Fourth Circuit more than ten days prior to the deadline date. The extension was granted by the Chief Justice in an Order dated January 3, 1980, which is included herein as Appendix C. The deadline was thereby extended until February 7, 1980. This petition is filed on or before that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process of law by the South Carolina Supreme Court acting through the Committee on Character and Fitness in that the Court and Committee denied him notice until after his hearing on reinstatement to active status of the standards by which his application for such reinstatement would be judged.

2. Whether the Petitioner was denied due process by the Supreme Court of the State of South Carolina and its Committee on Character and Fitness in that the Court has imposed upon him more stringent requirement than that imposed upon any other applicant for reinstatement to the practice of law, the burden thus imposed bearing no rational relationship to any legitimate state interest.

3. Whether the applicant has been denied due process of law by the South Carolina Supreme Court and its Committee on Character and Fitness in that the Court has subjected him to a standardless decision-making process which is not in keeping with the written rules describing

the means by which reinstatement to the practice of law may be obtained.

4. Whether the Petitioner has been denied due process of law by the Supreme Court of the State of South Carolina and its Committee on Character and Fitness in that it has effectively subjected him to disbarment by the procedure which it has accepted regarding his application for reinstatement following suspension, all without any proof of wrongdoing additional to that proved in the original disbarment proceedings, and, indeed, in the face of uncontradicted proof of rehabilitation on his part.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Carolina Supreme Court Rules on Disciplinary Procedure, Rules 8 and 37-41. (These are reproduced in Appendix D.)

STATEMENT OF THE CASE

Rogers W. Kirven, Petitioner, was indefinitely suspended from the practice of law by order of the Supreme Court of South Carolina dated December 10, 1976. Petitioner was disciplined for commingling a client's funds with his own personal assets and for loaning another client money and co-signing promissory notes for her. Both clients were relatively uneducated, one being unable to read or write.

As permitted by Rules 37 through 41 of the South Carolina Supreme Court on Disciplinary Procedure, copies of which are attached hereto as Appendix D, Petitioner made application for reinstatement to the practice.

In compliance with Rules 37 through 41 Petitioner submitted twelve (12) character witnesses to the Committee on Character and Fitness. Petitioner further offered letters from ten (10) attorneys at law, who knew the Petitioner and recommended that he be readmitted to the practice of law. No evidence in opposition to the application was presented.

On June 20, 1979 the Committee on Character and Fitness denied Petitioner's application for reinstatement. In its report, the Committee stated that the reason for this recommendation was Petitioner's failure to prove, by clear and convincing evidence, that he had "rehabilitated himself" as required by Rule 38 of the Rules on Disciplinary Procedure. In all other respects, the Committee reported that the Petitioner was sufficiently and adequately qualified for the practice of law in the State of South Carolina.

The Committee felt that the Petitioner had not shown his rehabilitation in that he had not demonstrated his specific ability to deal with poor and uneducated clients. Page 7, Report of Committee, Appendix A.

When the Committee produced its report and filed it with the South Carolina Supreme Court, Petitioner immediately objected to it as he is permitted to do by the Rules and filed his objections as required with the South Carolina Supreme Court. Among those objections was the following:

> "The Committee on Character and Fitness denied the Petitioner Due Process of Law by placing an unreasonable and/or impossible burden of proof upon the Petitioner to prove he had rehabilitated himself." (P. 2, Objections and Brief in Support of Objections to Report of the Committee on Character and Fitness, filed in the South Carolina Supreme Court on July 12, 1979.)

Further, although oral argument is not ordinarily permitted before the South Carolina Supreme Court on petitions for reinstatement, Petitioner moved to be heard and his motion was granted. Oral argument, of which no transcript is available, took place on September 11, 1979. The South Carolina Supreme Court refused Petitioner's attempted reinstatement three days later in its Order of September 14, 1979.

Petitioner thereafter duly moved for rehearing and reconsideration of his petition for reinstatement on September 21, 1979. That motion contained, *inter alia*, the following grounds:

> "The Rule on Disciplinary Procedure and the general law cited by the Committee concerning the standard required to prove 'rehabilitation' does not require the *additional* requirement of proof required by the Committee;
>
> "The unwarranted, unauthorized and unprecidented [sic] *additional* requirement of proof required by the Committee operated to deny the Petitioner due process of law." (Petition for Rehearing and Reconsideration of Petition for Reinstatement of Rogers W. Kirven in the South Carolina Supreme Court, September 21, 1979, p. 2) (Emphasis in original.)

The South Carolina Supreme Court denied reconsideration on October 10, 1979.

REASONS FOR GRANTING THE WRIT

I. The conduct of the Committee on Character and Fitness in this instance was egregious; such conduct is a matter of grave public concern and is damaging to the ideal of the rule of law.

The decisions of this Court make it eminently clear that procedural due process is a prequisite in matters of lawyer discipline. Since *Ex parte Garland*, 4 Wall. 333 (1866) it has been clear that the choice of an individual to pursue

legal practice is not "a matter of grace and favor bestowed by the state." (*Id.* at 379) Rather, although the state, acting through its Supreme Court, clearly has the right to set high standards for admission (and for readmission) to the bar, once those standards are set they may not be administered in an arbitrary and capricious fashion. See *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923); *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

The South Carolina Disciplinary Rules involved in this matter appear fair on their face. Thus, they draw a distinction between the sanction of disbarment and the sanction of suspension for an indefinite period (see Rule 8; see also *In Re Donelan*, 257 S.C. 405, 185 S.E.2d (1972)); although one may not ever be readmitted to the practice of law after having been disbarred, the Rules (see Rules 37-41) make it clear that one who has been suspended may reapply after the expiration of two years. One so doing must make a satisfactory showing by clear and convincing proof that he has rehabilitated himself and that he continues to have professional competence and learning in law as evidenced by certification by the Bar Examiners of his successful completion of re-examination for admission to practice. (See Rule 38) After a hearing process the Committee on Character and Fitness is to file a report with the Supreme Court, and the petitioner is to be given an opportunity to respond to any unfavorable recommendations. As has been noted before, although no oral argument is ordinarily permitted to the Supreme Court of the State regarding the provisions of the Committee report such argument was in fact granted upon motion in this proceeding.

After receiving the report and any response from the Petitioner, the Court is empowered by the Rule to "enter such order as it may deem appropriate . . ." (Rule 41)

Petitioner takes the position that the Rules, if followed accurately, are sufficient to provide necessary due process

to a disciplined attorney seeking reinstatement to the practice of law. However, this willingness is bottomed upon the assumption that the provision to the recommendation of the Committee on Character and Fitness is adhered to by that Committee and by the Supreme Court of the State in its necessary implication that the decision reached by those bodies will be based on information presented at the hearing and argued by the Petitioner and others legitimately before the tribunal in the hearing process and its adjunct review by the State Supreme Court. The contrary interpretation, that the South Carolina Supreme Court might be empowered by Rule 41 to enter any order it wished regardless of information made available to it in the hearing process, would be so patently offensive to the principles of due process that it cannot be thought to be a possible meaning of the Rule. This is, of course, the more so since we are taught by *In Re Ruffalo, supra*, that disbarment proceedings are "of a quasi-criminal nature" (390 U.S. at 551) so that it is clear that one seeking reinstatement is seeking vindication of, or entry into the process of rehabilitation of, his liberty interest in his good name.

Petitioner maintains that the Committee on Character and Fitness and the South Carolina Supreme Court have done one of several things. First, they may have imposed a new requirement of behavior upon him at the time of the hearing, and, indeed, *following* the hearing for all practical purposes, of which he theretofore had had no notice so as to be able to condition his behavior during suspension, let alone make a case that he had met them, which he might have been able to do had he known the nature of the proof he was to be required to make. This itself would deny him due process; *see In Re Ruffalo, supra*, where the Court pointed out that charges against an attorney subject to initial disciplinary proceedings must be made known to him fairly at a reasonable time prior to the hearing on the charges lest the charges themselves become a "trap" (*Id.*),

and *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), where this Court reversed the South Carolina Supreme Court when it radically re-interpreted a criminal statute so as to cover conduct which no one had theretofore believed it to cover; Petitioner here maintains that the Committee on Character and Fitness has radically reinterpreted a previously existing standard which had to be met in order to permit reinstatement in a fashion that was not predictable.

Second, they may have arbitrarily singled out the Petitioner for differential treatment from all others similarly situated to him without any articulated basis for their decision (cf. *In Re Lempesis*, 254 S.C. 284, 175 S.E.2d 234 (1970), in which a suspended attorney was reinstated after having made a showing of a nature very similar to that made by the Petitioner in this case; *Lempesis* appears to be the only publicly reported reinstatement decision ever handed down by the South Carolina Supreme Court which has contained any discussion of the requirements for reinstatement).

Third, they may have chosen to impose upon the Petitioner a more substantial punishment than that originally deemed appropriate, without any explanation therefor. This would be the "Catch-22" situation if the Committee and the Court really mean what they have said: if the Petitioner is supposed to demonstrate rehabilitation by dealing with poor and ill-educated clients it is difficult to see how he can do so while he remains under suspension; if a requirement has been imposed upon him which he cannot meet without violating the terms of his suspension, he has effectively been disbarred although his conduct was not originally found to warrant such a penalty.

If the Committee on Character and Fitness has indeed taken any one of the foregoing approaches, Petitioner respectfully submits to this Court that the Committee has treated him in an egregiously arbitrary fashion, and that

the Supreme Court of the State has permitted it to do so. If this is the case, if the allegations made herein can be established to the satisfaction of a neutral body (this Court), then the matter is one of great public significance. The State in disciplining lawyers should be held to the highest of due process standards. This is not because lawyers are entitled to more consideration than are other people. Quite the contrary. It is because a natural corrolary to the public of seeing arbitrary action with regard to the handling of disciplinary matters within the bar would be to increase the likelihood that members of the public would feel they stood little chance of proper treatment themselves. In brief, if a lawyer can't get fair handling, how is a lay person to expect decent treatment? As Justices Black and Douglas put it, the State in disciplinary proceedings must be held to "proceed according to the most exacting demands of due process of law." *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 174 91 S.Ct. 720, 731, 27 L.Ed.2d. 749 (1971) (Black and Douglas, JJ., dissenting).

Thus, this is not a case which should be viewed as regrettable if proved but not worthy of this Court's time. Indeed, this Court has already in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1956), pointed out that "even in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." (353 U.S. at 232) See also *Johnson v. Avery*, 393 U.S. 483, 490 n.11, 89 S.Ct. 747, 751 n.11, 21 L.Ed.2d 718 (1969), where the Court wrote "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights." More directly, as Mr. Justice Frankfurter put it concurring in *Schware, supra*, at 353 U.S. 232, 249, 11 S.Ct. 752, 761, 1 L.Ed.2d 796, 807:

> To a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession.
>
> But judicial action, even an individual case, may have been based on avowed considerations that are inadmissible in that they violate the requirements of due process. Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.

For this Court not to review the determination of the Supreme Court of the State of South Carolina would be to permit Petitioner's reasonably based allegations that the Committee on Character and Fitness had manipulated the standards to be used in determining his fitness for re-admission to the practice of law, which appear uncontroverted to have been met on the surface, to stand unanswered and hence would be to permit reasonable doubt as to the efficacy of the rule of law in reinstatement matters in this State to grow in the minds of the lay public and the bar. Such a posture would not be in keeping with the public function of this Court.

II. Review Should Be Granted in this matter Because the Posture of the Lower Federal Courts Regarding Allegations of Deprivation of Due Process and other Constitutional Guarantees in Bar Disciplinary Matters Has Been Generally That Those Courts Are Not Available to Persons Seeking Redress; This Places Upon This Court a Substantial Burden to Exercise its Unique Review Function Which is not Present Where Other Remedial Action in the Federal Court System is Permissible. Alternatively, This Court Should Exercise its Review Function to Address the Issue of the Nature of State Disciplinary Proceedings and Give

Guidance to the States and to the Lower Federal Courts on This Issue.

Briefly put, there is a split of authority among the federal circuit courts as to whether matters of state bar discipline may be reviewed by them at all. Several federal circuits have held that disciplinary action taken by a state court is a judicial proceeding and that they are without subject matter jurisdiction to review that action by way of an ordinary civil rights action, the only remedy for a person feeling aggrieved by such proceedings being to petition or appear to this Court. *See, e.g., MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969), *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), and *Ginger v. Circuit Court for Wayne County*, 372 F 2d 621 (6th Cir. 1967), *cert. den.* 387 U.S. 935, 87 S.Ct. 2061, 18 L.Ed.2d 998 (1967). Arguably contrary are *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974), and *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. den.* 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976). The position of the Fourth Circuit is unclear. See *Richardson v. McFadden*, 563 F.2d 1130 (4th Cir. 1977), in which the issue was avoided in an *en banc* decision which resulted in a *per curiam* opinion with three concurrences in the result, the concurrences indicating acceptance of the idea that no jurisdiction exists.

The issue was not made noticeably clearer by the summary affirmance by this Court of the judgment in *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). In that case a three-judge court heard a Civil Rights Act challenge to the constitutionality of procedures used by the State of New York to discipline attorneys charged with professional misconduct. There were three different actions consolidated, and the three judges produced three opinions. One judge felt that abstention was proper under the *Younger* line of cases *(Younger v. Harris*, 401 U.S. 37,

91 S.Ct. 746, 27 L.Ed.2d 669 (1971)); the second judge concurred in the result (dismissing the complaints), but on the merits, holding that New York's procedures for discipling its attorneys are constitutional; and the third judge dissented, reaching the mertis and concluding that New York's disciplinary procedure was constitutionally infirm in denying due process and equal protection to attorneys affected by it.

The precise effect of the summary affirmance under the circumstances must be regarded as uncertain, but it is at least clear that none of the three judges in the three-judge court seemed to feel that the Court was without subject matter jurisdiction.

If the lower federal courts are without subject matter jurisdiction in this area, the pronouncements of this Court discussed in the first section of this petition, *supra*, are particularly apposite: if bar discipline is a matter which the courts should approach with a definite punctilio, and this Court is the only place where the actions of the states may be subjected to federal review, then this Court, it would seem, should owe a certain responsibility to see to it that that review is a meaningful one. It should, therefore, take as large a number of significant cases in this field as possible.

If, on the other hand, the state supreme courts and their various auxiliary bodies are in fact following more nearly administrative practices than they are pure judicial ones in carrying out the disciplinary function, review in this Court would ordinarily be *improper* without prior review in some other judicial proceeding. This case would offer a useful vehicle for making this distinction, and hence aiding to resolve confusion in the lower federal courts and in the state courts at a time when the resolution of that confusion would aid substantially in the gradual process of restoring public confidence in the functioning of the bench and bar.

CONCLUSION

As the foregoing discussion indicates, the Committee on Character and Fitness in the instant case has denied Petitioner due process of law in a manner that is particularly difficult to police; this Coult would perform a signal public service by requiring it to adhere to its own rules. Additionally, review should be granted in this Court in order to provide guidance as to the nature of State Disciplinary Proceedings.

For these reasons, Petitioner respectfully urges that a Writ of Certiorari be issued to review the decision in this case.

Respectfully submitted,

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APPENDIX A

The State of South Carolina
In The Supreme Court

In the Matter of:)
)
Rogers W. Kirven,)
)
Petitioner.)

REPORT OF THE COMMITTEE ON CHARACTER AND FITNESS

Rogers W. Kirven was indefinitely suspended from the practice of law by Order of the Supreme Court dated December 10, 1976. *In Re Rogers W. Kirven*, 267 S.C. 669, 230 S.E.2d 899 (1976). Mr. Kirven has filed a Petition for Reinstatement to the Bar, and the Committee, pursuant to Section 40 of the Rule of Disciplinary Procedure, held a hearing on the Petition on April 26, 1979. The following members were present: Joseph W. Hudgens, Rembert D. Parler and Nathaniel L. Barnwell. C. Dexter Powers disqualified himself and Jeter E. Rhodes was required to make an appearance elsewhere by direction of the United States District Court. The Petitioner was present, represented by his attorneys, Edward E. Saleeby, Esquire, James C. Cox, Jr., Esquire, and Martin S. Driggers, Esquire. Testimony of various witnesses and Petitioner was taken under oath and has been transcribed.

SUMMARY OF TESTIMONY

Twelve witnesses testified in behalf of the Petitioner in addition to his own participation as a witness. All of the witnesses expressed the opinion that Petitioner was

qualified to practice law. However, their *opinions* were expressed *in essentially general terms* and were *not supported by examples of specific conduct as evidence of rehabilitation or by any specific indications of rehabilitated character.* The most common expression by the witnesses was that Petitioner had "mellowed," become less self-centered, less "cocky," and more active in his church.

Coleman Ratteree, a process engineer with a paper mill in Florence County, testified that he had known Petitioner for six or seven years. His personal knowledge has been intimate only since 1975, however, and that *basically through church activities.* Both Petitioner and the witness are elders in Hopewell Presbyterian Church. He testified that Petitioner has been Clerk of the Session for the past two and one-half years. The *witness has never had an attorney-client relationship or other business or financial relationship with Petitioner.* He has no knowledge of the reasons for Petitioner's suspension. He testified that Petitioner had undergone a "tremendous change" but was *not specific beyond the belief that Petitioner has become less self-centered and less critical of others.*

C. Cooper Tedder, Mayor of Florence, testified. He has known Petitioner for approximately twenty years but *had no business or professional relationship with him before the suspension.* The Mayor, who engages in the real estate business, now has property of Petitioner listed with him. That listing is the only business transaction the witness has had with Petitioner. The witness had a general knowledge of the reasons for the suspension but no knowledge of the specific conduct which resulted in the suspension. This witness has seen Petitioner become more "mellow." He is of the opinion that Petitioner is desirous of treating people fairly but *cannot support the opinion by any examples of conduct.* He finds Petitioner humble now whereas he was egotistical before the suspension.

William C. Barnes, Sheriff of Florence County, testified. He has known Petitioner for about twenty years, primarily in his capacity as a law enforcement officer involved with Petitioner as he practiced in General Sessions Court. He always found Petitioner to be fair and that he represented his client well. He has seen a change in Petitioner's attitude which he expressed as now less self-centered and less "cocky." *He testified to no specific instances of conduct illustrative of that changed attitude.*

H.L. Dargan, Jr., Vice President and Loan Officer of Peoples Federal Savings and Loan Association, testified. Mr. Dargan has a law degree but has never practiced law. Petitioner presently has a loan with the Association which is current. *He testified that he did not know whether there had been any change in Petitioner's life or life style.* His understanding of the reasons for Petitioner's suspension was that he had co-mingled funds.

Harry Legett Huggins, employed with Conwood Corporation, a merchant of snuff, chewing tobacco and hotshot insecticide, testified. He has known Petitioner for over twenty years as a friend, but *Petitioner has never represented him.* He testified that if Petitioner were reinstated, he would have no hesitation to engage his services. He and Petitioner now own a tract of land which they are developing. He testified that Petitioner told him the reason he was suspended was that he had co-mingled funds. He knows of no reason why Petitioner should not be reinstated and does not believe he will co-mingle funds again. The witness was asked what changes he had noticed about Petitioner; he testified to none other than Petitioner "*. . . was hurt when he lost his license.*"

John A. McInnes, Jr., a realtor who has handled rental property and insurance accounts of Petitioner since 1976 and who has been a hunting and fishing companion of Petitioner, testified. He testified that the suspension of Petitioner was *ego damaging to him, and he does not think*

the event which led to the suspension (which he understands to be co-mingling of client funds with his own) *will reoccur.* However, he does not know whether that is the result of a change in character or the desire of avoiding the consequences of such conduct.

J.C. Gregg, Clerk of Court for Florence County, testified. He and Petitioner are members of the same church and serve on the Board of Session. *Petitioner has done no legal work for him,* but he would not have had any hesitation in employing Petitioner. He thinks Petitioner's character is good and knows of no reason why he should not be allowed to practice law. His understanding of the reason for the suspension was that Petitioner had co-mingled funds and did not give security for a loan from a client. His opinion is that Petitioner was of good character prior to the suspension but his opinion "may have changed some" as a result of the suspension. The only basis which the witness has for a current opinion of good character similar to the one he held prior to the suspension is that *Petitioner is more regular in church attendance and activities.*

Thomas L. Kirby, owner and operator of Kirby's Gulf Service in Florence, testified. He has known Petitioner for approximately twenty years as a customer and friend. His social contact with Petitioner has been limited — a supper or "get-together" once or twice a year, golf matches two or three times a week. The *Petitioner has never represented him as a lawyer.* The only change in Petitioner since the suspension is that he is a little more humble than he used to be.

J. Wallace Gregg, a retired Army Warrant Officer, Veterans Service Officer for Florence County and Wildlife Commissioner, now a neighboring farmer and fishing companion of Petitioner, testified. He and Petitioner are members of the same church. Petitioner once represented him in a legal matter which resulted in a settlement whereby the witness obtained money. He testified that he

told Petitioner to take his fee out of the settlement and he would give the balance to the church. In response to that, Petitioner decided to give his fee to the church. The witness *did not testify to any specific instance of rehabilitation but felt* that Petitioner has "mellowed quite a lot since then . . . [and] . . . seems more humble than he was at the time before." His understanding of the reasons for the suspension was that Petitioner had co-mingled funds.

John McPherson McKnight, employed at the Florence Post Office, testified. He has known Petitioner for twenty years or more, ". . . socially, friendly, neighborly, church." Since the suspension he has been associated with Petitioner at least twice weekly, either socially or at church. He has *never had a professional relationship with Petitioner,* nor has he ever "had any legal work done," but he feels that Petitioner is "eminently qualified" to practice law, knows of no reason why he should not be reinstated and if he is reinstated he would have no hesitation in using his services. The witness was asked what changes he had observed since the suspension. His testimony was that Petitioner had become more "mellow." "I have never known him to be all that egotistical. I've heard other people state but I have noticed a little change, not very much." But he does not ". . . think under any circumstances he would ever co-mingle funds or whatever he did before."

One member of the Florence Bar, where Petitioner had practiced, testified in his behalf; that was James C. McLeod, Jr., Esquire. Mr. McLeod has lived in Florence all of his life and has been practicing law in Florence since April 15, 1959. His practice consists primarily of defense work and litigations and he testified that he had extensive litigation in which Petitioner was the adversary on the other side. He has always found Petitioner to be fair, candid and straightforward. This witness's sole knowledge of the reason for suspension of the Petitioner was derived from the opinion of the Court in *In Re Rogers W. Kirven,*

267 S.C. 669. He feels that the wrong done by Petitioner as set forth in that opinion will never be repeated. He feels that the Petitioner should be reinstated. *He did not testify as to any specific matters indicating rehabilitation.*

The Petitioner's wife, Mrs. Janice B. Kirven, testified. She testified that Petitioner had benefited from the suspension in that he has had more time to know himself, other people and his family. It has caused him to "walk closer to the Lord . . . [and become] . . . more sensitive of other people's feelings and other people." She has no doubt that he now knows the proper way to handle client's funds.

The Petitioner testified in his own behalf. A good portion of his testimony was related to explanation of the events which led to his suspension. *With respect to rehabilitation, his testimony was simply* that *he will never again engage in any conduct contrary to the Canons or put himself in a position where such could be interpreted.* Other than the cessation of the practice of law and the commencement of full time farming and renting real estate and becoming an officer in his church, the Petitioner *did not testify to any significant changes in his life after the suspension.* He testified that he felt that he had been rehabilitated *but gave no testimony as to any specific situations from which that could be inferred.*

There was *no testimony presented* to the Committee *concerning* the Petitioner's conduct since the suspension *in the context of dealings with unintelligent and naive persons,* the overreaching of whom was a major factor leading to the suspension. *None of the witnesses who testified exprssed any appreciation for that aspect of the of the reasons for Petitioner's suspension but was primarily limited to the understanding that Petitioner had simply co-mingled funds,* which was perhaps a technical violation of the Canons but not necessarily wrong.

After the hearing letters from ten members of the Bar, including the member of the Florence Bar who testified

and Petitioner's former partner, were received by the Committee. They are made a part of the record and submitted to the Court along with this Report.

The foregoing summary of the testimony *relates exclusively to Petitioner's claim of rehabilitation.* The record supports the other requirements of the Rule with respect to reinstatement. He has not engaged in the practice of law since the suspension and he has successfully completed a re-examination given by the Board of Bar Examiners.

FINDINGS OF FACT

1. The Petitioner has been indefinitely suspended from the practice of law. *In Re Rogers W. Kirven,* 267 S.C. 669, 230 S.E.2d 899 (1976).

2. Two years have expired since the entry of the Order of indefinite suspension and the filing of the Petition for Reinstatement.

3. The Petitioner has successfully completed a re-examination for admission to the Bar given by the Board of Bar Examiners.

4. Since his suspension the Petitioner has engaged in farming and real estate rentals for his livelihood; he has been active in his church and in civic affairs. *He has not engaged in the practice of law.*

5. To some extent the Petitioner has become more humble, more mellow and less self-centered.

6. There is no expressed objection to the reinstatement of Petitioner by the Bar or anyone else.

CONCLUSIONS

The burden is upon Petitioner to establish that his character and rehabilitation are such that he is entitled to be reinstated to the practice of law. It is generally held that one in the position of Petitioner must meet the following burden:

He must prove, if he can, after the expiration of a reasonable length of time, that he *appreciates the significance of his dereliction*, that he has lived a consistent life of probity and integrity, and that he possesses the good character necessary to guarantee uprightness and honor in his professional dealings, and therefore is worthy to be restored. 7 Am.Jr.2d, *Attorneys at Law*, §72, p. 93.

It is also generally held that a belief that a disbarred attorney has been sufficiently punished is not a warrant for his reinstatement since the purpose of discipline is to protect the public and the profession. 7 Am.Jur2d, *Attorneys at Law*, §71, p. 92.

Under Section 38 of the Rule of Disciplinary Procedure, the Petitioner must establish by clear and convincing proof that he has rehabilitated himself.

The *testimony* presented by and on behalf of Petitioner *consists only of the claim of rehabilitation and general opinions by the witnesses that they know of no reason why he should not be reinstated*, with the general belief that the conduct which led to the suspension will not happen again. The only testimony concerning rehabilitation by the witnesses was that Petitioner had "mellowed," "become more humble," and "less self-centered." The Petitioner was suspended for gross overreaching of uneducated clients who were unable to intelligently negotiate their own financial affairs and for the concoction of *"highly suspect* transactions within the attorney-client relationship for personal profit." *None of the witnesses who testified on behalf of the Petitioner really addressed the issue of Petitioner's rehabilitation from one who would and did grossly overreach and improperly deal with the financial affairs of unintelligent, uneducated and naive clients.* There was *no testimony or evidence presented to the Committee as to Petitioner's relationship or conduct with such persons* since the suspension.

The Committee, under the Rule, is required to conduct a hearing and take evidence concerning Petitioner's claim of rehabilitation. §40, Rule of Disciplinary Procedure. That rehabilitation must be shown by clear and convincing evidence to be from the grievance for which Petitioner was suspended. It is the conclusion of the Committee that *Petitioner's conduct and activities* since the suspension are *not significantly different from before the suspension.* The bare conclusions of the witnesses do not establish by clear and convincing evidence that Petitioner has been rehabilitated from the character involved in the dealings for which Petitioner was suspended.

RECOMMENDATION

It is the recommendation of the Committee that the Petitioner's application for reinstatement be denied.

Chairman — Joseph W. Hudgens

Member — Rembert D. Parler

Member — Nathaniel L. Barnwell

June 20, 1979

APPENDIX A

The Supreme Court of South Carolina

ORDER

IN THE MATTER OF: ROGERS W. KIRVEN

After a full and complete study of the record and petition for reinstatement filed by the above named individual together with the report of the Committee on Character and Fitness, it is the order of the Court that the petition for reinstatement be denied, and

IT IS SO ORDERED.

s/ J. Woodrow Lewis	C.J.
s/ Bruce Littlejohn	A.J.
s/ J.B. Ness	A.J.
s/ Wm. L. Rhodes, Jr.	A.J.
s/ George T. Gregory, Jr.	A.J."

Columbia, South Carolina
September 14, 1979

APPENDIX B

The Supreme Court of South Carolina

October 10, 1979

Edward E. Saleeby, Esquire
Messrs. Saleeby, Cox, Driggers & Bledsoe
P.O. Box 519
Hartsville, South Carolina 29550

Re: In the Matter of Rogers W. Kirven

Dear Mr. Saleeby:

The Court has this day refused your Petition for Rehearing and Reconsideration of Petition for Reinstatement in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis	C.J.
s/ Bruce Littlejohn	A.J.
s/ J.B. Ness	A.J.
s/ Wm. L. Rhodes, Jr.	A.J.
s/ George T. Gregory, Jr.	A.J."

Very truly yours,

CLERK

APPENDIX C

Supreme Court of the United States

No. A-559

IN THE MATTER OF
ROGERS W. KIRVEN,
Petitioner

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1980.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 3rd day of January, 1980

APPENDIX D

Disciplinary Procedure

8. Effect of Discipline

A. A person disbarred shall never be readmitted to the practice of law in this state.

B. A person who, having been indefinitely suspended from the practice of law and reinstated, is thereafter found guilty of subsequent misconduct shall be permanently disbarred.

C. A person who, having been publicly reprimanded for misconduct, is thereafter found guilty of subsequent misconduct, shall be suspended for an indefinite period from the office of attorney at law, or permanently disbarred, depending upon the seriousness of such misconduct.

D. A person who having received two private reprimands for misconduct and is thereafter found guilty of subsequent misconduct shall be publicly reprimanded or suspended for an indefinite period from office of attorney at law or permanently disbarred, depending on the seriousness of such misconduct.

E. A person who, having voluntarily surrendered his license to practice, may be reinstated in the manner hereinafter provided, or who, having been suspended for an indefinite period from the office of attorney at law, may be reinstated in the manner hereinafter provided.

37. Reinstatement Procedures

No petition for reinstatement to the practice of law shall be filed within two years after the entry of an order indefinitely suspending the petitioner from the practice of law in this state, or within two years after the denial of a petition for reinstatement filed by such petitioner.

A petition for reinstatement to the practice of law by an attorney transferred to disability inactive status shall be in accordance with paragraph 19 of this Rule as well as the foregoing provisions.

38. Contents of Petition for Reinstatement

A. Subject to the foregoing restrictions, any person who has been indefinitely suspended from the practice of law or who is in a disability inactive status and who wishes to be reinstated may file with the Clerk of this Court his verified petition and ten copies thereof setting forth:

(1) The date when indefinite suspension or disability inactive status was ordered, and, if there was a reported opinion concerning the same, the volume and page of the official reports of this Court where such opinion appears:

(2) The dates upon which any prior petitions for reinstatement were filed, denied or granted;

(3) The names of all persons and organizations, other than the petitioner and the Board, who were entitled under this Rule to receive from the Clerk of this Court certified copies of the disciplinary order of this Court resulting in the petitioner's suspension; or transfer;

(4) The name of the county in which he resides at the time of the filing of the petition, and of each county in which he proposes to maintain an office if reinstated;

(5) The facts upon which he relies to establish by clear and convincing proof that he has rehabilitated himself; and

(6) Proof of professional competence and learning in law, which proof shall include certification by the Bar examiners of his successful completion of reexamination for admission to practice.

A. In any Order of reinstatement the Court may direct that the attorney limit his practice to certain areas of the law; work under the supervision of another attorney; require reports at intervals or any other reasonable requirement that will insure the protection of the public and the administration of justice.

39. Petition Referred to Committee on Character and Fitness

The Clerk of this Court shall forward five copies of the petition for reinstatement to the Committee on Character and Fitness appointed under the rules of this Court governing admission of persons to the practice of law in this state; and such petition shall be deemed to be referred, without court order, to said Committee. Provided that a suspended attorney may take the examination for admission to practice administered within the nine months prior to the date allowed for his reinstatement petition.

40. Action by Committee on Character and Fitness

The Committee on Character and Fitness shall, with all convenient dispatch, proceed to hold a hearing or hearings, take evidence concerning petitioner's character and his claim of rehabilitation, and report to this Court the proceedings had before said Committee, together with the Committee's findings of fact and recommendations. Reasonable notice of all such hearings before the Committee shall be given to the petitioner or his counsel and to the President of the local Bar association in the county or counties in which the petitioner resides and in which he proposes to maintain an office in the event of his reinstatement. Such hearings may, in the discretion of the Committee, be public and shall be public if the petitioner so requests in writing. Any interested person, any member of the Bar, and a representative of the South Carolina Bar or of any local Bar association may appear before the Committee in support of, or in opposition to, the petition.

41. Committee's Report to Be Filed; Procedure Thereupon

The report of the Committee on Character and Fitness, and six copies of the Committee's findings of fact and recommendations, shall be filed in the office of the Clerk of this Court, who shall thereupon notify petitioner or his counsel of such filing and shall with such notice enclose a copy of the Committee's findings of fact and recommendations. If the Committee shall have recommended denial of the petition, the petitioner shall have ten days from the date of his receipt of notice thereof from the Clerk within which to file with the said Clerk objections to the report and brief in support of such objections; together with five copies of such objections and brief; but no oral argument will be heard thereon. Upon consideration of the Committee's report and of such objections and brief as may have been filed by the petitioner concerning the same, the Court shall enter such order as it may deem appropriate, and may include in such order such provision for reimbursement of the actual and necessary expenses incurred in connection with the proceedings as shall appear just and proper.